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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	) ET Docket No. 92-9
	)
Redevelopment of Spectrum to	) RM-7981
Encourage Innovation in the	) RM-8004
Use of New Telecommunications	)
Technologies	)
	)

OPPOSITION OF COX ENTERPRISES, INC.

Werner K. Hartenberger
Laura H. Phillips
Melissa Rogers

Its Attorneys

March 30, 1993

Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

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SUMMARY

Cox Enterprises, Inc. ("Cox") opposes the petitions for clarification or reconsideration filed by the American Public Power Association ("APPA") and Utilities Telecommunications Council ("UTC"). These petitions seek to expand the category of microwave licensees that are exempt from involuntary relocation far beyond public safety licensees to include all state and local government licensees.

Expanding the class of exempt licensees would have a destructive impact on the development of new services such as Personal Communications Services. Cox's own studies of microwave usage in the 1850-1990 MHz bands within the Major Trading Area that includes San Diego demonstrates that there is extensive use of the band, making the widespread introduction of PCS problematic. Similar studies in other markets have confirmed that microwave congestion is commonplace. Further limiting the group of microwave licensees that can be relocated will so restrict the amount of spectrum available to PCS that it may never develop in the manner envisioned by the Commission in the PCS rulemaking proceeding.

The Commission has crafted ample protections for all microwave incumbents, regardless of their status. No microwave user will ever be required to relocate

microwave equipment at no cost, without suffering any genuine operational dislocations.

Because the emerging technologies service provider will shoulder all the expenses of relocation there is no obvious harm that will befall metropolitan water districts and public transportation entities that are subject to the involuntary relocation provisions of the Commission's rules. On the other hand, if the Commission fails to ensure that sufficient spectrum can be made available on a reasonable timetable for PCS providers to offer new services, the Commission's time and effort in drafting the incumbency protection rules will be wasted and new services stymied.

APPA and UTC fail to establish under the relevant legal standard that the rule adopted by the Commission was not a logical outgrowth of the Commission's rulemaking proposal. Both the Notice and separate statements of individual Commissioners made clear the Commission's particular sensitivity to the concerns of public safety licensees. Therefore, the petitioners' suggestion that the rule as adopted was unexpected, unfair and somehow "inconsistent" with the Commission's proposal is unpersuasive.

Finally, Cox supports the suggestion made by Pacific Telesis in its petition that microwave licensees that have "in-house" engineers should be permitted to do their own relocation work rather than have this work performed by outside

consultants. The Commission's rule governing the mechanics of relocation should be sufficiently flexible to accommodate these situations where a slight variation of general procedures would be more expeditious, efficient or cost effective.

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OPPOSITION OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its opposition to the petitions of the American Public Power Association ("APPA") and Utilities Telecommunications Council ("UTC") for clarification or reconsideration of aspects of the Federal Communications Commission's First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992) (the "First Report and Order") in the above-referenced docket.[1/]

In their petitions, APPA and UTC urge the Commission to "clarify" its rule to expand the number of incumbent microwave licensees that are exempt from involuntary relocation. They argue that the Commission should revise its adopted rule to exempt all state and local government licensees from involuntary relocation, rather than exempting only those licensees that provide critical public

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1/ Cox limits its comments on UTC's Petition to the issue of the exemption of incumbent microwave licensees from mandatory relocation.

safety functions.[2/] APPA and UTC claim that restricting the exemption to public safety entities is "inconsistent with the Commission's proposal."[3/] APPA claims that the public safety exemption is "arbitrary, unwarranted and unworkable."[4/]

Cox opposes these petitions because they seek clarification of a rule that is unambiguous and threaten to further delay or derail the relocation process for a large number of microwave licensees, severely hampering the emerging technologies providers as they attempt to introduce service. Any expansion of the microwave relocation exemption to include microwave licensees in categories other than public safety will have a destructive impact on the development of emerging technologies. As the Commission has recognized, emerging technologies "will provide the American public with enhanced personal access to communications services and enable businesses to realize increases in productivity" as well as "promote the ability of American industry to maintain its competitive leadership position in global telecommunications markets."[5/]

If the Commission were to revise its public safety rule in accordance with APPA's and UTC's petitions, it would so restrict the amount of spectrum available for Personal Communications Services that it will not develop as the Commission envisions in the PCS rulemaking. Recognizing this, the Commission

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2/ In this pleading, Cox refers to this rule as the "public safety rule" or the "public safety exemption."

3/ Petition of APPA at 4; Petition of UTC at 7.

4/ Petition of APPA at 6.

5/ First Report and Order, 7 FCC Rcd at 6886.

has crafted ample protections for all incumbent microwave licensees, regardless of their status.[6/] Therefore, Cox urges the Commission to reject APPA's and UTC's petitions, reaffirming its rule exempting only public safety licensees from involuntary relocation.[7/]

I. The Commission's Rule Exempting Public Safety Licensees From Involuntary Relocation Does Not Require Clarification.

The Commission's adopted rules for emerging technologies state, in relevant part, that:

> After [Date] Private Operational-Fixed Microwave Service licensees will maintain primary status in these bands unless and until an emerging technology service licensee requests mandatory relocation of the fixed microwave licensee's operations in these bands; however, public safety licensees will be exempt from any mandatory relocation.[8/]

Contrary to APPA's and UTC's suggestion that the Commission may have "inadvertently restricted" this exemption to public safety licensees, this rule clearly expresses the Commission's judgment that public safety licensees, as distinguished from the myriad water districts, public power licensees and state and local

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6/ Under the Commission's rules, all incumbent microwave licensees will retain co-primary status indefinitely, and no microwave licensee ever will be required to relocate unless and until the emerging technologies service provider guarantees payment of all relocation expenses, builds the new microwave facilities at the relocation frequencies and demonstrates that the new facilities are comparable to the old. See First Report and Order, 7 FCC Rcd at 6890.

7/ As discussed infra, Cox supports Pacific Telesis Group's ("PacTel's") proposed rule change that would give the well-qualified technical and engineering staffs of existing licensees the option to perform relocation work "in house."

8/ First Report and Order, 7 FCC Rcd at 6897, 47 C.F.R. § 94.59(b).

government licensees, are deserving of an exemption from involuntary relocation.[9/] While APPA and UTC may disagree with the Commission's decision to restrict this exemption to public safety licensees, the Commission's rule is unambiguous. Thus, the Commission must reject arguments that it must revise its rule to substantially broaden the scope of the exemption.

II. The Commission's Final Rule Exempting Public Safety Licensees From Involuntary Relocation Is A "Logical Outgrowth" Of The Commission's Rulemaking Proposal.

The Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et. seq, requires an agency's notice of proposed rulemaking to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[10/] The courts have held that "the notice requirement [of this provision] is satisfied so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal."[11/] The focus of the "logical outgrowth"

9/ In the text of its First Report and Order the Commission also made clear that only those state and local government licensees that perform public safety (or emergency) functions are exempt from any involuntary relocation. The Commission stated that "we will exempt existing 2 GHz fixed microwave operations licensed to the public safety and special emergency radio services -- including state and local governments, police, fire, and medical emergency communications -- from any involuntary relocation." First Report and Order, 7 FCC Rcd at 6891.

10/ 5 U.S.C. § 553(b)(3) (1988).

11/ See Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991) reh. en banc denied (May 30, 1991) (citations omitted).

test "is whether. . .[the party] ex ante, should have anticipated that such a requirement might be imposed."[12/]

The Commission's public safety rule meets the requirements of the "logical outgrowth" test. The Commission's First Notice of Proposed Rulemaking (the "First Notice") in this docket differentiated between state and local government licensees generally and public safety licensees specifically. The Commission stated that, "[w]e are particularly sensitive to the need to avoid any disruption of police, fire and other public safety communications."[13/] This recognition of the paramount importance of public safety functions and the need to protect these licensees set the stage for the Commission's final rule.[14/]

While the final rule exempts a smaller class of microwave incumbents from relocation than APPA and UTC advocate, the rule as adopted is clearly a

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12/ See, e.g., Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 446 (D.C. Cir. 1991) reh. en banc denied (May 30, 1991) (quoting Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d 506, 549 (D.C. Cir. 1983) (citations omitted) (Court found that MSS petitioners reasonably should have anticipated that the Commission might license a multi-ownership entity and require applicants to contribute funds to such an entity as a criterion of membership; "[a]ccordingly, the Commission's $5 million cash contribution rule was a 'logical outgrowth' of the rules concerning financial requirements contained in the [NPRM], and the petitioners were not deprived of reasonable notice of the Commission's action.")

13/ First Notice, 7 FCC Rcd 1542, 1545 (1992).

14/ Similarly, in his separate statement on the First Notice, Commissioner Duggan stated: "I believe that the Commission must always demonstrate maximum sensitivity to the needs of incumbent users -- especially those in the public safety community -- who have for long periods acted in good faith and have abided by our rules." First Notice, 7 FCC Rcd at 1549 (emphasis added).

reasonable and foreseeable outgrowth of the concerns expressed by the Commission from the outset of the proceeding. In fact, the rule the Commission adopted affords far greater protection to all incumbent microwave licensees than was initially proposed in the First Notice.[15/] APPA and UTC cannot seriously claim that their status or need for special protection was overlooked by the Commission. Therefore, the suggestion that the rule adopted by the Commission was unexpected, unfair and somehow "inconsistent" with the Commission's proposal is unpersuasive.[16/]

The courts also have recognized that "the statutory duty to submit a proposed rule for comment does not include an obligation to provide new opportunities for comment whenever the final rule differs from the proposed

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15/ For example, the Commission initially proposed that incumbent microwave licensees be afforded co-primary status and corresponding interference protection for a ten to fifteen year period. After this period, these facilities were to operate in the 2 GHz band on a secondary basis only. See First Notice, 7 FCC Rcd at 1545.

rule."[17/] Accordingly, an "agency need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally. Otherwise, the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules."[18/]

The Commission's final determination on the scope of exemption does not represent the type of major departure from a proposed rule that requires renotice under the APA. The Commission adopted its rule only after its review and consideration of the rulemaking record. While Cox has gone on record expressing its concerns regarding the fairness of all aspects of the rules and their impact on new services development, the Commission worked diligently to craft a careful balance between the spectrum needs of present and future users.[19/] In contrast,

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17/ Air Transport Ass'n of America v. Civil Aeronautics Board, 732 F.2d 219, 224 (D.C. Cir. 1984).

18/ Id. (quoting Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982)).

If the Commission was required to renotice changes that follow logically from or that reasonably develop its proposed rules, it "would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973) (finding that absence of the right to comment on the technical methodology was not a violation of the statute or due process.) The Commission must have the latitude to learn from the rulemaking process. Thus, the law wisely permits administrative agencies to alter their proposed rules in a reasonable manner during the course of the rulemaking process.

19/ See e.g. Comments filed by Cox on January 13, 1993, pp. 4-7, and Reply Comments filed February 12, 1993, pp. 2-7.

APPA and UTC seek to upset the balance the Commission has struck between competing spectrum interests under the guise of rule clarification.

III. The Commission's Final Rule Exempting Public Safety Licensees From Involuntary Relocation Is A Reasoned Decision And Is Well-Supported By Public Policy.

The public safety exemption will provide absolute and permanent protection from relocation to the core of state and local government licensees that are critical to public safety -- those Commission licensees that provide services related to the police force, fire department and medical emergency communications. The Commission believes that these core public safety licensees, as distinguished from other microwave licensees, including those with quasi-public purposes, should be exempt from involuntary relocation.

Contrary to the suggestions of APPA and UTC, the Commission's rules do not ignore the needs of non-public safety state and local government licensees. Their legitimate interests are amply protected under the Commission's plan. Under the rules, all incumbent microwave licensees will retain co-primary status indefinitely, and no microwave licensee ever will be required to relocate unless and until the emerging technologies service provider guarantees payment of all relocation expenses, builds the new microwave facilities at the relocation frequencies and demonstrates that the new facilities are comparable to the old.[20/] Putting aside the marginal inconvenience that relocation may cause the

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20/ First Report and Order, 7 FCC Rcd at 6890.

microwave licensee, the microwave licensee will benefit greatly from relocation because it will receive substantially more advanced equipment at no cost. Given these strong protections for incumbents, the Commission must reject APPA's and UTC's suggestion that it has established less than comprehensive protections for non-public safety microwave incumbents.

In fact, Cox believes that the compromise the Commission forged between the spectrum access needs of emerging technologies proponents and incumbent microwave licensees may be lopsided in favor of incumbent licensees.[21/] The Commission's well-informed decision to limit the exemption from involuntary relocation to public safety licensees is one of the elements of the overall plan that assists in the maintenance of a careful balance between opposing interests. The Commission should not permit petitioners to undermine this careful balance by creating gaping holes in the application of well-conceived rules.[22/] The Commission clearly recognizes that the result of over-protecting incumbents will

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21/ In its comments and reply comments, Cox argued that the Commission will upset its careful balance of competing interests and potentially destroy the viability of new services if it adopts any transition period prior to permitting relocations, particularly a lengthy one. See Comments filed January 13, 1993, pp. 4-7, and Reply Comments filed February 12, 1993, pp. 2-7, of Cox filed in this proceeding.

22/ For example, APPA's suggested revision of the public safety rule would permit all "licensees eligible to be licensed in the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation, Public Safety, and Special Emergency radio services" to be exempt from mandatory relocation. Petition of APPA at Appendix B. The Commission has already recognized that permitting a large number of non-public safety-related licensees (such as the California State Polytechnic, the Metropolitan Water District and the Southern California Rapid Transit District) to be exempt from mandatory relocation would greatly impede the delivery of emerging technologies such as PCS.

be disastrous for the development of new services. If the Commission fails to ensure that sufficient spectrum can be made available on a reasonable timetable for emerging technologies providers to offer new services, the Commission's time and effort in drafting the incumbency protection rules will be wasted and new services will be stymied.

Cox's January 1993 study assessing the impact of microwave incumbents on PCS development in the 1850-1990 MHz band for the Major Trading Area ("MTA") that includes San Diego illustrates the extreme congestion that PCS licensees will face. Of the 266 microwave paths licensed in the MTA, 99 or 37% appear from Commission records to be licensed to entities with governmental or quasi-governmental functions. Approximately 67 of these 99 licenses appear to be held by entities that may qualify as public safety licensees. Thus, even under the current formulation of the Commission's rule, 25% of all the microwave paths in the MTA will be exempt from involuntary relocation. Broadening the exemption to include all state and local government licensees will serve only to exacerbate the already difficult service development challenge facing PCS licensees.[23/]

Cox's frequency utilization study revealed that in six important population centers throughout San Diego there is currently no available spectrum within the

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23/ Cox recognizes that entities within the San Diego MTA such as the San Bernardino Community College, the Orange County Rapid Transit District and the Salt River Agricultural Project may be marginally inconvenienced at some future date by the requirement to relocate. It is important to note, however, that under the Commission's rules none of these entities will suffer economic harm or operational dislocations. In fact, these entities will enjoy a windfall by receiving new and substantially more advanced microwave equipment at no cost.

bands designated for licensed PCS that can be used by PCS licensees on a shared.

relocate a significant number of microwave incumbents. The Commission's public safety exemption is consistent with this goal and should not be disturbed.

IV. Cox Supports PacTel's Proposed Rule Change That Would Give The Well-Qualified Technical And Engineering Staffs Of Existing Fixed Microwave Licensees The Option To Perform Relocation Work "In House."

In a petition for clarification or reconsideration of the Commission's First Report and Order, PacTel argues that "there are many existing fixed microwave licensees (for example, Telesis's subsidiary, Pacific Bell) who have well-qualified technical and engineering staffs and would prefer to do relocation work 'in-house' rather than have it performed by outside companies whose technical qualifications may be unknown."[27/]

Cox supports PacTel's proposal. In this situation and in others where the circumstances warrant, the Commission should ensure that the rules governing the specifics of relocation mechanics are sufficiently flexible to accommodate individual situations where a slight variation of the general procedures as suggested by PacTel would be more expeditious, efficient or cost effective.

V. Conclusion

Cox urges the Commission to reject APPA's and UTC's petitions for clarification and/or reconsideration because they seek clarification of a rule that is unambiguous and question matters that have already been resolved in an

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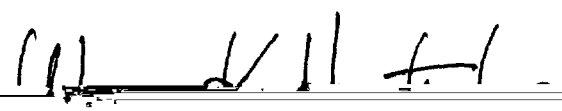
27/ Petition of PacTel at 2.

equitable manner. Cox also opposes these petitions because they advocate revised rules that, if adopted, would cripple the ability of PCS licensees to implement service. The Commission's rules provide ample protection to the legitimate interests of all microwave incumbents. For these reasons, the Commission should reject APPA's and UTC's petitions.

Respectfully submitted,

COX ENTERPRISES, INC.



CERTIFICATE OF SERVICE

I, Carole Walsh, hereby certify that today on this 30th day of March, 1993, I caused a copy of the OPPOSITION OF COX ENTERPRISES, INC. to be served by first-class mail, postage prepaid or hand delivery to the following:

Jeffrey L. Sheldon, Esq.
Sean A. Stokes, Esq.
Utilities Telecommunications Council
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Ted Coombes, Senior Legislative Representative
American Public Power Association
2301 M Street, N.W., Suite 300
Washington, D.C. 20037

Margaret deB. Brown, Esq.
Pacific Telesis Group
130 Kearny Street, Room 3659
San Francisco, CA 94108

James L. Wurtz, Esq.
Pacific Telesis Group
1275 Pennsylvania Avenue, N.W., 4th Floor
Washington, D.C. 20004

Henry Goldberg, Esq.
Joseph A. Godles, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Counsel for Apple Computer, Inc.

Carole Walsh